
6KBW – BREXIT BRIEFING NO. 4 Brexit and Policing Co-operation (Part I)

This series of briefing papers from 6KBW College Hill explores issues arising for consideration in domestic criminal law and practice as the Government embarks on re-framing the terms of our relations with the EU.

Briefing No. 4 is the first of two papers on policing cooperation. It considers the future of the relationship between UK and EU agencies and relevant EU law concerning police work. The second part considers issues arising in the area of police cooperation and information sharing.

THE CURRENT LANDSCAPE

Policing cooperation measures fall within the EU competence previously referred to as ‘Justice and Home Affairs’, now known as the ‘Area of Freedom, Security and Justice’ (‘AFSJ’).

As with many of the measures falling within the AFSJ, cross-border law enforcement is a matter arising from the principle of free movement. It is an area with which the EU has long been concerned but which took on a new strength and prominence following the entry into force of the Treaty of Lisbon in 2009.¹

A number of EU-wide agencies relevant to police work have now developed, chief among them: **Europol** (the EU policing intelligence agency); **Eurojust** (the agency coordinating the work of prosecutors across jurisdictions); and the European Police College or **CEPOL** (the European Union Agency for Law Enforcement Training).

Alongside the agencies, a number of specific measures have developed in EU law to facilitate cross-border policing at investigative and evidence-gathering stages.

¹ As previously discussed in these Briefings, the Treaty of Lisbon brought previously so-called ‘Third Pillar’ EU law (into which Justice and Home Affairs matters fell) with the mainstream of EU law and expanded the roles and influence of EU institutions (including the CJEU) accordingly.

THE EU AGENCIES

Europol, formerly the European Police Office, was founded in 1998 and became an EU agency in 2010.² Its mandate is to support the national police forces of Member States in preventing and combating organised crime, terrorism and other forms of serious crime by the collection, analysis and exchange of information. Its particular areas of expertise are in combating drug trafficking (for which it was originally founded); human trafficking; vehicle trafficking; cybercrime; money laundering; and counterfeiting. Europol provides regular research briefings and threat-assessments; forensic services (including crime scene analysis); and a substantial database for the purposes of investigation.

Europol possesses no executive powers and its officials are not entitled to conduct investigations in Member States nor arrest suspects – however, it plays an important role in coordinating operations between Member States through Joint Investigation Teams or ‘JITs’, run by, or involving, Europol officials.

Europol’s 900 staff include some 205 ‘Europol Liaison Officers’ seconded from police officers from Member States and non-EU partner agencies, including Interpol, the US Drug Enforcement Agency and the FBI.

Eurojust is the EU’s judicial cooperation unit. It was established formally in 2001³ and operates to support the coordination of investigation and prosecution of offences by Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests. Eurojust’s areas of activity mirror those of Europol. Its membership includes national prosecutors, magistrates and police officers from Member States. It also has permanent liaison officers seconded from non-EU states.

CEPOL was founded in 2000⁴ though its framework and funding were strengthened in 2005.⁵ Its stated purpose is to train senior police officers, to optimise cooperation between national forces; and to develop a European approach to the problems facing Member States in the fight against crime, crime prevention and the maintenance of law and order and public security. CEPOL publishes research and offers training for law enforcement officers throughout the EU. Originally based in the UK, CEPOL moved to Hungary in 2014.

POLICING MEASURES

Currently, the law relevant to the collection and transfer of evidence between

² See Council Decision 2009/371/JHA, which simplified Europol’s legal structure and made certain changes to its funding arrangements.

³ Council Decision 2002/187/JHA.

⁴ Council Decision 2000/820/JHA.

⁵ Council Decision 2005/681/JHA.

Member States in criminal cases is found in a number of provisions, namely:

- The Council of Europe Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (and its two additional protocols).
- Parts of the Schengen Convention.
- The 2000 EU Convention on mutual assistance in criminal matters (and its Protocol).
- The 2008 Framework Decision on the European evidence warrant.
- The 2003 Framework Decision on the execution in the European Union of orders freezing property or evidence (as regards freezing of evidence).

In May 2014, however, the European Parliament adopted Directive 2014/41/EU on the **European Investigation Order** ('the EIO Directive'). From May 2017, the EIO Directive will replace the much of the existing regime, with the aim of making cross-border investigations faster and more efficient.

The EIO Directive covers almost all investigative measures including interviewing witnesses, obtaining evidence already in the possession of Member State authorities, intercepting communications and monitoring bank accounts. It marks a significant development from the previous system, under which Member States had a wide discretion to comply with evidence-gathering requests. Under the EIO Directive, each Member State must, in principle, recognise and execute a request coming from another.

THE FUTURE

Leaving the EU will require the UK to renegotiate its relationship with EU agencies such as Europol, Eurojust and CEPOL. Needless to say, this is a matter which will fall outside the sole control of the UK Government and will depend to a significant extent on the willingness of Member States and EU institutions to continue to cooperate with the UK.

The current political consensus is that EU/UK policing co-operation is of substantial mutual benefit in the fight against international crime and, especially, terrorism – a matter of particular concern in the light of recent terrorist attacks in continental Europe. Policing is also an area in which the UK has, historically, been held in high regard among Member States. The UK model of anti-terror policing, involving close collaboration between police forces and intelligence agencies, has been spoken of as a model which Europol seeks to replicate.⁶

Certainly the focus domestically has been on how to maximise the extent to which the UK can continue to collaborate with EU agencies, chief among them Europol. Indeed, before the referendum, the Government recognised that the UK used

⁶ See for example the interview with the current director of Europol in Time Magazine: <http://time.com/4336919/europol-terrorist-paris-brussels-rob-wainwright/>

Europol more than almost any other EU Member State.⁷

The EU Home Affairs Sub-Committee has begun an inquiry into future UK/EU policing and security co-operation, with evidence taken from academics, NGOs and legal experts.⁸ The first oral evidence session was held on 14 September 2016, at which it was the clear view of witnesses that the current arrangements and working relationships should be preserved so far as possible by way of ‘associate membership’. What is less certain is how the UK will approach the interim period before it leaves the EU and the adoption, into domestic law, of the EIO Directive.

EUROPOL: ASSOCIATE MEMBERSHIP

A number of non-EU countries currently collaborate with Europol under bilateral arrangements known as ‘associate membership’. These associations have taken various forms, ranging from operational cooperation to technical and strategic cooperation.

Switzerland, Norway, Iceland, Australia, Canada and the US are among the states to have secured bilateral operational agreements with Europol. While these establish certain means by which the forces may cooperate, they are not without difficulty. The following matters in particular are notable:

- (i) **Restricted Access to information:** Associate membership does not currently provide non-EU states the same level of access to shared information as for EU members. Europol’s operational agreement, for example, does not permit full access to Europol’s databases: non-EU states must ask EU states to access the database on their behalf. To this extent, the information-sharing process for associate members is slower and more cumbersome.⁹
- (ii) **Limited strategic role:** Associate members do not contribute to the strategic development of Europol, setting its organisational priorities, nor do they take part in its management. This would represent a significant change in a relationship in which the UK has previously played a leading role: among other matters, the current director of Europol is a British civil servant.

⁷ See HM Government, Background Note, ‘The UK’s cooperation with the EU on justice and home affairs, and on foreign policy and security issues’.

⁸ See “Academics and NGOs questioned on UK-EU police co-operation post-Brexit”, available at <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-subcommittee/news-parliament-2015/academics-ngo-lawyer-evidence-session/>.

⁹ The witnesses to the Committee inquiry recognised that in this regard associate membership would amount to “second-tier” membership.

- (iii) **Delay:** as a new bilateral relationship, any UK/Europol arrangement would require time to negotiate. Whilst the starting point would be a high degree of cooperation and common ground, the novelty of such a relationship (when compared to existing bilateral arrangements) may give rise to its own difficulties.
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CONCLUSION

In the circumstances, it seems likely that the UK will seek to negotiate a closer future relationship with Europol than any other associate membership has previously entailed. At the moment, this would seem to be an arrangement which remaining Member States may be keen to preserve.

The UK's continuing relationships with Eurojust and CEPOL will arise separately for negotiation, and arrangements with Eurojust in particular will require consideration more broadly in the context of the UK's future extradition regime.¹⁰

However, whilst the Government has now indicated its intention to pass a Great Repeal Act (effectively preserving a 'snapshot' of EU law domestically, as at the point of exit), there has been a notable absence of discussion as to the adoption in domestic law of interim measures of EU law, such as the implementation of the EIO Directive, and as to the extent to which the UK will implement measures to keep pace with EU law as it develops. The latter point is likely to be of particular significance in negotiations with Europol in the context of the data sharing agreements and the basis for information retention and exchange in the future. These are matters which will be explored in the second part of the briefing on policing cooperation.

Members of 6KBW College Hill edit the leading textbooks 'EU Law in Criminal Practice' (Oxford University Press), and The Extradition and Mutual Legal Assistance Handbook (Oxford University Press). Please contact Andrew Barnes (andrew.barnes@6kbw.com) if you would like further information about our work on extradition, EU matters or otherwise.

¹⁰ See Brexit Briefing No. 2.